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In The

SUPREME COURT OF THE UNITED STATES

No. **75-1140**

October Term, 1975

FRANK RUSSO,

Petitioner,

-against-

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner, Frank Russo, prays that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Second Circuit entered on November 28, 1975, which affirmed a judgment of the United States District Court for the Southern District of New York, entered on a Jury verdict convicting Petitioner on various counts under the indictment herein.

Opinion Below

The opinion of the Court of Appeals is not yet officially reported. No opinion was rendered

by the District Court. The opinion of the Court of Appeals is set forth in the Appendix to the petition for certiorari heretofore filed by co-petitioner, Joseph Natale, on or about December 23, 1975, No. 75-894 which petition and the arguments therein set forth are hereby adopted by petitioner, Frank Russo.

Jurisdiction

The judgment of the Court of Appeals was entered on November 28, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Constitutional and Statutory Provisions Involved

1. The Fifth and Sixth Amendments to the United States Constitution.
2. 18 U.S.C. 891; and 18 U.S.C. 894.

Questions Presented

(1) Whether the Court of Appeals was correct in its interpretation of 18 U.S.C. 894 (Collection of Extentions of Credit by Extortionate Means) by not requiring the Trial Court to charge the Jury that it is an essential element of that crime for the Government to prove that the victim was actually placed in fear of harm by the defendant.

(2) Whether the refusal of the Trial Court to grant the Defendant's request for the production of the Grand Jury testimony of its only witness

was a violation of both Due Process of Lawunder the standards of Procedural Fairness and under the Brady Doctrine and also a denial of the Defendant's Sixth Amendment right to have effective representation at trial.

(3) Whether the defendant was denied Due Process of Law and his right to a Jury Trial when the Trial Court instructed the Jury that two of the three essential elements of the crime were undisputed.

1. Introduction

The Defendant Russo, along with co-defendants Joseph Natale and John Conti, were tried under a three count indictment which charged them with a conspiracy to collect extentions of credit by extortionate means, with the substantive crime of using such means to collect such extentions, 18 U.S.C. 2 and 894, and with an attempt to obstruct commerce by extortion, in violation of 18 U.S.C. 1951. The Jury found Russo and Natale guilty on the extortionate collection counts, but not guilty on the obstructing commerce count. Defendant Conti was acquitted on all counts. The Defendants Natale and Russo were sentenced to concurrent terms of five years imprisonment on each guilty count.

2. Statement of the Case

The Government's proof at trial was based upon testimony of Peter Amato, a neighbor of the defendant Frank Russo.

In reviewing his background, Amato indicated that he was employed with the Federal Credit Union in 1973 for a period of seven months and was soon discharged from that firm because of his acts of embezzlement. He received a six month suspended sentence for that crime. Thereafter, he was employed by the firm of Barbara Creations, a manufacturer of bridal veils, as a bookkeeper. Amato also embezzled funds from Barbara Creations, admitting that he stole more than $12,000 from that firm before the President of Barbara Creations, Murray Weiss, uncovered his scheme on February 8, 1975.

Amato attempted to borrow money from the Defendant Russo for alleged investment purposes in March of 1974. Russo introduced Amato to Natale for this purpose. Amato testified that they (Russo and Natale) gave him $2,000.00 (R 127) and then they (Russo and Natale) told him that it would cost him $75.00 a week, and that this payment was nothing against the loan. He was told that the $2,000.00 could be paid back at any time.

In April of 1974, Amato again contacted Russo for another loan of $500.00. He indicated that the loan was given by Russo, and was repaid in ten weeks in the amount of $950.00.

In September of 1974, Amato again approached Russo and told him that the Barbara Creations company was having cash flow problems and that if he would be able to loan that company money, he would be able to solidify his position at

Barbara Creations. (R137).

Pursuant to this request, in November, Amato had a meeting with Natale, Russo and one Peter Lapin, the accountant and attorney for Natale. During that meeting, there were discussions pertaining to the financial conditions of Barbara Creations.

On December 3rd, Amato met Natale and Russo at Russo's office and was given $10,000. Amato indicated that he was told to repay this loan by payments of $300.00 a week. (R139). Amato then indicated that Natale was called out of the room and Russo told him that it would be a good idea to leave a "token" for the favor, since no collateral was being asked for to secure the loan. He then gave Russo $3,000.00 and Russo told him not to mention the $3,000.00 "token" to Natale. Amato, thereafter, deposited the $7,000.00 into the Barbara Creations account (R140).

On January 22 or 23rd of 1975, Amato called Russo and told him that the Company was overdrawn at the Bank and that he needed more money. He was given $3,000.00 by Natale and Russo. He indicated that he was told to repay this loan back four for three and that the sum of $4,000.00 was to be returned in three weeks.

At this point in the testimony, Amato first mentions the transaction which was the basis for the instant indictment and conviction. On January 31, 1975, he contacted Russo and told him that the Company was again overdrawn at the Bank.

He testified that he was given $5,000.00 and was told by the defendants that he would have to repay the sum of $6,500.00 in one week.

On February 5th, he contacted Russo and told him that he needed additional time to make the payments and Russo told him that he would be given until that Friday. On Friday, he called Russo and told him that he didn't have the money and didn't know when he could have it. On February 10th, he told Russo that he was trying to get the money but he wasn't having any luck. In the morning of February 11th while he was leaving for work, he met Russo and they traveled to work together in Amato's car. During that car ride, Amato indicated to Russo that he didn't have the money and Russo replied, "Pete you better stop jerking around. You have got to come up with the money by 10:00 o'clock because after a while Joey will just waste you and not worry about the money at all". After this conversation, Amato decided to report this threat to the police. 1

1. It was the contention of defense counsel during the trial that the reason Amato decided to go to the police was to prevent his own arrest for embezzlement from Barbara Creations and not because of the alleged fear generated in him by the defendants.

Pursuant to police instructions, Amato went to see Natale and Russo with a Detective Losito and introduced Losito to Natale and Russo as a friend by the name of Frank Lucas, who had been trying to help him raise the money. [2]

Losito told Natale and Russo that he (Amato) was scared and that he was with him all day. Losito also said that he had dealings with Shylocks before and that he (Amato) was trying to get the money. Natale then replied, according to Amato, "that you and ten guys like your friend or Jesus Christ off the cross couldn't help you if you keep giving me this kind of story about not paying me back. Then the money won't matter. I will kill you" (this conversation is not recorded) (R168).

The next day, Amato called Frank Russo from Barbara Creations and told Russo that Murray Weiss couldn't get the money, that he had been trying to raise it but that he did not have it at that time. Russo asked him how much money Murray's car was worth. He replied $15,500.00 and Russo said "all-right I will call you" and then ended the conversation (R170).

He spoke again with Russo later that day and, according to Amato,, Russo inquired if he had obtained the money and when Amato replied in the negative, Russo said, "Well, you just tell

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2. Amato was equipped by the Police with recording devices to record his conversation with Natale and Russo.

him, Muttel, if he doesn't come up with the money he loses his car and you lost your house". Amato indicated that previously he had given Russo a deed to his house and some gold coins as security before he received the $10,000.00 loan (R172).

On February 13th, Amato went to Russo's office and explained to Natale and Russo that he didn't have the money. Natale assured him that there was nothing to worry about and handed him a yellow paper. The paper asked for certain information pertaining to the financial condition of the company. On February 14th, Amato again called Russo and told him that he didn't have any money and didn't know when he would have it. Russo ended the phone conversation without giving any answer.

Amato later called back and told Russo that Murray (Weiss) had returned and had $3,000.00 and the stuff Russo requested (referring to the financial information of the corporation... (R176).

Thereafter, Amato went to Russo's office and saw Russo, Natale and the third defendant John Conti. Amato then gave Russo $3,000.00, which in turn was given to Natale who gave it to Conti. He also gave Natale the financial information which he previously requested. Natale indicated that he would give this information to Peter (Lapin) and he would know what to do with it (R180).

That night Russo informed Amato that Conti was a "hit man... there to size you up in case Amato hadn't paid."

February 16th was the christening of Amato's youngest child and Russo came to Amato's house to congratulate him and spend time with the family (R191). Later in the evening, in Amato's basement, Russo told Amato that he must have the balance of the money by the 18th because the 17th was a holiday.

On the 17th of February, Amato phoned Russo and told him that Weiss would like to meet him and discuss some arrangements concerning how the money was going to be paid back.

Later that day, Natale and Russo arrived at Barbara Creations where they met Amato, Weiss and Officer Poltorak, who was posing as Leon Hauser, Weiss' partner (R194). At that meeting, Natale wanted to know what arrangements were going to be made to pay back the balance of the money. Weiss replied that "We can make some sort of commitment". According to Amato's testimony, Natale then indicated that he would be willing to lower the "vig" by $500.00 and have the rest of the money paid back in two months. (A reading of the transcript of this conversation gives a completely different version; whereupon the mention of "vig" is brought up by Weiss and most of the conversation of Natale pertains to the past conduct of Amato and the arrangement that could be made for the payment or renegotiation of the loan).

Amato further testified that he called Russo that night and explained to him that Weiss thought it over and decided not to pay Russo any money.

Amato then indicated that another meeting was arranged at Barbara Creations. At this meeting ing, Russo was there with Peter Lapin; also present were Murray Weiss, Officer Poltorak posing as Leon Hauser, and Amato. According to Amato, Lapin did most of the talking and inquired of Weiss if he, Weiss, owed Amato any money and whether in fact Amato had an interest in the business. Weiss replied that not only didn't he have an interest in the business but that Amato was stealing from the business, and that he was not responsible for this debt and that he would not pay it (R199). (The transcript of this conversation indicated that Weiss did most of the talking and after Weiss told Lapin about Amato's conduct, Lapin told Weiss he agreed Weiss didn't owe this money.)

Amato testified that during the evening of the 19th of February, Russo visited him at his house and told him that he (Amato) had lied and that he was now in trouble and to put him "in their good eyes is going to cost $5,000.00 extra for lying to them and stringing them along". According to Amato, Russo then said if he didn't come up with this money that Joey will come into his house and do a job on his wife and children while he watched (R202) (this purported conversation was not recorded).

Even though these purported threats were made, Amato continued to fraternize with Russo and would drive to work with him at least three days a week. In fact, on February 16th, Russo was invited and did in fact attend Amato's son's christening. On that date, he borrowed $100.00

from Russo for the expenses of his son's christening. Amato also revealed that he helped Russo in the preparation of his tax returns and that Russo installed electrical outlets in his house and helped him panel his basement without charging him for these services.

Amato testified that he was never physically harmed in any way by any of the defendants (R228). He also indicated that at the time he received this money he never had the intention of paying it back (R203).

1. THE COURT OF APPEALS HAS IMPROPERLY READ 18 U.S.C. 894 BY DELETING AN ESSENTIAL ELEMENT OF THE PROOF NEEDED FOR CONVICTION UNDER THIS STATUTE. THE COURT OF APPEALS ELIMINATED THE NEED FOR THE GOVERNMENT TO PROVE THAT THE COMPLAINANT WAS PLACED IN FEAR OF HARM BY THE DEFENDANT'S ACTIONS. THIS INTERPRETATION OF THE STATUTE IS IN CONFLICT WITH OTHER CIRCUITS WHICH REQUIRE PROOF OF THE VICTIMS' STATE OF MIND AS AN ESSENTIAL ELEMENT OF THIS CRIME. THIS QUESTION IS ONE OF FIRST IMPRESSION IN THIS COURT AND SHOULD BE RESOLVED SO THAT A POTENTIAL DEFENDANT WILL HAVE FAIR WARNING OF THE NATURE OF THE ACTS REQUIRED FOR A CONVICTION UNDER 18 U.S.C. 894.

Peitioner Russo therein adopts the argument advanced in support of this point as set forth in the petition filed by co-petitioner Joseph Natale (No. 75-894).

2. THE CIRCUIT COURT OF APPEALS LIMITED THE SCOPE OF THE BRADY DOCTRINE 373 U.S. 83 BY REFUSING TO REQUIRE THAT THE GOVERNMENT PRODUCE THE GRAND JURY TESTIMONEY OF A DEFENSE WITNESS PRIOR TO HIS BEING CALLED TO TESTIFY ON BEHALF OF THE DEFENDANT. THAT COURT FAILED TO CONSIDER THAT SUCH DENIAL ALSO DEPRIVED THE DEFENDANT OF HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE COUNSEL AT TRIAL.

Petitioner Russo therein adopts the argument advanced in support of this point as set forth in the petition filed by co-petitioner Joseph Natale (No. 75-894).

3. THIS COURT HAS RULED IN THE CASE OF IN RE WINSHIP 397 U.S. 358, THAT THE DUE PROCESS CLAUSE PROTECTS THE ACCUSED AGAINST CONVICTIONS EXCEPT UPON PROOF BEYOND A REASONABLE DOUBT OF EVERY FACT NECESSARY TO CONSTITUTE THE CRIME WITH WHICH HE IS CHARGED. THE "WINSHIP RULE" WAS VIOLATED IN THIS CASE, AS WELL AS THE DEFENDANT'S RIGHT TO HAVE A JURY TRIAL WHEN THE TRIAL COURT INSTRUCTED THE JURY THAT TWO OF THE THREE ELEMENTS OF THE CRIME WERE UNDISPUTED.

Petitioner Russo therein adopts the argument advanced in support of this point as set forth in the petition filed by co-petitioner Joseph Natale (No. 75-894).

CONCLUSION

FOR THE REASONS SET FORTH ABOVE, THIS PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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Petitioner Russo hereby adopts the appendix to the petition heretofore filed by co-petitioner Joseph Natale, (No. 75-894).

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OCTOBER TERM, 1975

FRANK RUSSO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the trial court's instructions to the jury were inadequate because they omitted an essential element of the offense with which he had been charged and improperly informed the jury that there did not appear to be any dispute in the evidence relating to two additional elements of the offense. He also contends that the court erred in denying his request for the production of a transcript of the grand jury testimony of a defense witness.

After a jury trial in the United States District Court for the Southern District of New York, petitioner and co-defendant Joseph Natale were convicted of having conspired to collect extensions of credit by extortionate means and of having used extortionate means to collect extensions of credit, in violation of 18 U.S.C. 2 and 894.[1] Peti-

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[1]Petitioner and Natale were acquitted of having attempted to obstruct commerce by extortion, in violation of 18 U.S.C. 1951. A third defendant, John Conti, was acquitted on all counts.

tioner was sentenced to concurrent prison terms of five years on each count. The court of appeals affirmed on November 28, 1975. The petition for a writ of certiorari was not filed until February 11, 1976, and is therefore substantially out of time under Rule 22(2) of the Rules of this Court. The issues raised in the petition do not, in any event, warrant further review.

The petition for a writ of certiorari filed by petitioner's co-defendant Joseph Natale is currently pending in this Court in No. 75-894 (filed December 23, 1975). Petitioner and Natale have raised precisely the same issues in their petitions, and the factual context in which those issues have arisen is identical. For the reasons discussed at some length in our Memorandum in Opposition in No. 75-894, we submit that petitioner's contentions are without merit.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1976.

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[2]We are serving on petitioner's counsel a copy of our Memorandum in Opposition in No. 75-894.